REFLECTIONS

ON A LATE

RESOLUTION OF THE HOUSE OF PEERS,

RESPECTING THE

PEERAGE OF SCOTLAND;

ADDRESSED TO

THE CHANCELLOR,

AND

C. J. OF THE COMMON PLEAS,

LONDON

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REFLECTIONS

ON A LATE

RESOLUTION OF THE HOUSE OF LORDS,

RESPECTING THE

PEERAGE OF SCOTLAND.

MY LORDS!

THE world in general does juſtice to the characters of you both, and with pleaſure ſees your Lordſhips in the Court of ultimate juriſdiction. You are the two Luminaries of the Law, and if your opinion had been the ſame on the ſubject I treat of, it would have been great preſumption in me to attempt any further diſcuſſion. But as this caſe had been agitated at three different periods before, and the opinion of the Houſe of Lords had varied at each, and as upon the [illegible] diſcuſſion, in leſs than a century, the Chancellor and Chief Juſtice

 have

have differed, *in toto*, both on the law and the principle of it, the caſe may yet be conſidered as open to the diſcuſſion of your inferiors.

After attending the debate, I came away without waiting the deciſion, deeply lamenting that the law, and the principles it is founded on, ſhould be ſo vague and uncertain, as to render it poſſible for two men of your Lordſhips ſound judgment and deep reading to differ on them. If the law, whereby two kingdoms are united, is ſo doubtful, the foundation ſo difficult to be ſounded, that your Lordſhips cannot agree upon either of them, it is much to be feared that other laws, whereon the liberty and property of the ſubject reſt, may not be more fixed and certain. This reflection gives but a melancholy proſpect to the man whoſe right and property may hereafter be decided on by a Court of Judicature, whoſe opinion has varied on the ſame caſe four times already, in leſs than a century. How inſecure muſt every conſiderate man feel the whole of his poſſeſſions in this iſland! And yet an impartial citizen of the world muſt confeſs, that ever ſince the Revolution, the Houſe of Peers has been the chaſteſt and moſt enlightened Court of Judicature in any quarter of the globe. On this foundation ſtands the characteriſtic fame of the Britiſh Senate. A real and well-earned honour, not derived from the caprice of Kings, or merit of anceſtors, but from the ſpirit of juſtice

which has reigned in the breaſts of almoſt every Peer of England alike, for near a century paſt. Your country calls upon you, my Lords, to leave it pure and unſtained to your poſterity, as you received it from your fathers. Beware how you admit the prejudices or affections of party to interfere with your deciſions on a queſtion of right. Man is but the child of habit, and your deviating but ever ſo little from the ſtrait line of juſtice in one or two caſes, may ſoon lead you to the ſame degree of contempt, as you now ſee the Parliament of Paris and Seſſion Court of Scotland held in.

I am aware of the ridicule that may be thrown on treating the peculiar right of a Scotch Peer, as a matter of much moment to thoſe nobles whom the King has or may call to an hereditary ſeat in the Upper Houſe of Parliament. But admitting the ridicule to be juſt, when applied to the rank and pre-eminence of a Duke before a Baron *, or the

* It is much the faſhion to deſpiſe the difference of pre-eminence amongſt Peers, and to deride the pride of blood and deſcent. I much doubt whether this is not mere affectation. Conſequence is derived from a variety of circumſtances, and the opinion and eſtimation of mankind is founded on the aggregate of the circumſtances any individual is diſtinguiſhed by. Moſt men cannot well ſay, why they feel and pay more reſpect to a Duke than to a Baron, to a Knight of the Garter than to a Knight of the Bath; but that they do is certain, and this kind of diſtinction is undoubtedly one very principal circumſtance from whence conſequence is derived. As to the pride of

 deſcent,

the trifling advantage of a vote in the election of the ſixteen Peers of Scotland, I muſt be permitted to ſay, that no deciſion of your Lordſhips Houſe can be of trifling conſequence. If you allow yourſelves a greater degree of latitude in judging of one caſe than another, your juriſdiction will ſoon be at an end. Of all caſes, your Lordſhips ought to be moſt careful and cautious, when a queſtion ariſes on the Union. The ſmalleſt inadvertency on that ground may open a door of confuſion and diſquiet, that no man may ever be able to ſhut again.

Lord Loughborough argued, that the motion of Lord Stormont was not made to you in your judicial capacity. From the moment his Lordſhip took this ground, it became apparent, that the cauſe he ſupported was loſt, if the Houſe conſidered itſelf as deciding on a queſtion of right. No man more upon his guard againſt ſophiſtry than his Lordſhip, and when he condeſcends to make uſe of it himſelf, every one admires his abilities. Out of reſpect to his Lordſhip, I will conſider the queſtions he put to the Houſe, "Where "are the parties? Where are the Counſel?" as arguments, and I will anſwer them by other queſtions. In a caſe that affected the rights of a whole

deſcent, people may, without being fools, imagine that blood has much effect upon the diſpoſition, character, and abilities of the human ſpecies, as upon horſes and dogs, &c. And thoſe who conſider this as a mere prejudice, muſt acknowledge it is a prejudice that leads to great and noble actions.

body

body of men conjunctively and ſeparately, how came there to be no parties? Did the Peerage of Scotland not know that the King had given hereditary ſeats to two of the Peers they had elected to repreſent them? If they had thought their repreſentation incomplete, would they not have appeared and ſaid ſo? Before your Lordſhips took upon you to decide on the rights and franchiſes of any corporate body, or of the individuals of it, ought you not to have ſummoned them? The Judges of England were conſulted before the Duke of Brandon was admitted into the Britiſh Houſe of Lords; before you deprived the Duke of Hamilton of his ſeat in the Scottiſh Houſe of Lords; would it not have been decent and proper to conſult the Judges of Scotland? Were there no other perſons beſides the Peers of Scotland affected by your Lordſhips' decree concerning them?

The fact is, that your Lordſhips have decided a queſtion which affects the private rights of every ſubject, both of England and Scotland, without hearing any of them, or conſulting the Judges, as is uſual upon caſes of much leſs importance.

At the next general election, Lord Loughborough will, in all probability, have no reaſon to complain of there being neither parties nor counſel at your Lordſhips bar. Caſes may, and probably will ariſe. The names of the late Dukes of Hamil-

Hamilton, Argyll, Queenſberry, Gordon and Atholl, of the late Earl of Abercorn, &c. muſt be called over; they may anſwer, and the election not improbably turn on their votes. Your Lordſhips will then have the pleaſure of hearing counſel at your bar argue, that a deciſion of the Houſe of Lords, in the teeth of the Union, and of the act following thereon, is no more than waſte paper. But what is of yet greater importance, it is not impoſſible that, during the preſent parliament, a judicial caſe of property may be decided by the caſting votes of two Scotch Peers, who, according to the articles of Union, have no right to ſit in the Parliament of Great Britain. What if the party injured complains to the Houſe of Commons? are your Lordſhips prepared for a conference on a queſtion which your own opinion has ſo frequently varied on? Let us ſuppoſe, for a moment, theſe two new Scotch Peers had been in the Houſe of Lords when Mr. Fox's India Bill was ſent up from the Houſe of Commons, and that it had been thrown out by the caſting votes of theſe two independent Nobles; do your Lordſhips think Mr. Fox would have been ſilent? or that Mr. Pitt would, in thoſe days, have been able to defend them? Let us ſtate the facts your Lordſhips would then have to argue upon.

1. Immediately after the Union, the Duke of Queenſberry, in Scotland, was created Duke of Dover,

Dover, in England; the Houſe of Lords determined that the Duke of Dover could not be Duke of Queenſberry.

2. Six years afterwards, the Duke of Hamilton, in Scotland, was created Duke of Brandon, in England; the Houſe of Lords determined that no Scotch Peer was in a capacity of being created a Peer of Britain, and thereupon refuſed admittance to the Duke of Hamilton, and turned out the Duke of Dover, who re-became Duke of Queenſberry.

3. Seventy years after this, upon the opinion of the twelve Judges, the Houſe of Lords determined, that, according to the articles of the Union and act of ditto, a Peer of Scotland was in the capacity of being created a Peer of Britain, and the Duke of Hamilton was admitted as Duke of Brandon.

4. Three years after this, the Houſe determined that the Duke of Brandon could not be, and was not Duke of Hamilton *.

In

* It being eſtabliſhed by the Union, that all the Peers of Scotand ſhall have right to elect and be elected; and the Houſe of Peers having decided that ſuch of them as have been created Peers of Britain, ſhall neither elect or be elected for Scotland; it neceſſarily follows, that they [illegible] no longer Peers of Scotland.

In anſwer to which, the Houſe of Commons will tell you, we did not deſire your Lordſhips to recapitulate all the contradictions your Houſe has fallen into on this ſubject, but to ſtate the articles and act of Union, and deſire your Lordſhips to inform us how there comes to be eighteen inſtead of ſixteen repreſentatives of the Peerage of Scotland in the Parliament of Great Britain.

The Union expreſsly ſtates, that all the Peers of Scotland ſhall be repreſented in the Parliament of Great Britain, and that each Peer ſhall have right to elect and be elected one of the ſixteen Repreſentatives of that part of the Peerage.

The act regulating the mode of this election ſtates, that ſuch Nobles as before the Union were Peers of both countries, ſhall have right to elect and be elected repreſentatives of the Peerage of Scotland, the ſame as if they had not a ſeat in the Parliament of Great Britain, by virtue of their Engliſh honors.

In oppoſition to theſe authorities, comes a deciſion of the Houſe of Lords, that though Peers of England may be Peers of Scotland, Peers of

land. If Baron Douglas, of Ameſbury, and Viſcount Hamilton, were ſtiled Duke of Queenſberry and Earl of Abercorn, they muſt have right to ſit, and vote amongſt the Peers of Scotland, according to the articles of Union.

Britain

Britain may not. An aſſertion which, if it had been made by any leſſer authority, I ſhould have been tempted to call a mere quibble on words, ſince Peers of England have all the rights, neither more nor leſs, than the Peers of Britain; this argument would be juſt the ſame if it was urged, that a Peer created by George the IId, might, notwithſtanding, be a Peer of Scotland, but that a Peer created by George the IIId could not.

The motion made by Lord Stormont, and carried by Lord Loughborough, according to them, was founded on the ſpirit or principle of repreſentation in general, which (ſay their Lordſhips) requires an almoſt perfect parity of circumſtances in the ſituation of thoſe to be repreſented. This ſuppoſed ſpirit of the law applies equally againſt Peers of England and of Britain, and it muſt require the fulleſt and moſt uncontrovertible proof to ſatisfy men, that the words and clear meaning of an act of Parliament on this great important occaſion of a Union, are in direct oppoſition to the ſpirit and principle of repreſentation in general.

Whenever the law itſelf is ſo obſcure as to render it neceſſary to have recourſe to the principle it is founded on, I tremble for the conſequences of the reſearch. The age of man is ſcarce ſufficient to foreſee them all. I know not whom, or what it may

affect. If ſuch arguments are admitted in your Lordſhips judicial deciſions againſt the letter of the law, no man will be able to gueſs whether he has any rights and franchiſes or not, from the uncertainty of the tenure by which they are held. This is the only caſe on which your Lordſhips have permitted the ſpirit of law in general to be pleaded againſt the expreſs words of a compact, ſanctified, confirmed, and explained by act of Parliament. The comprehenſive word *all*, in the articles of Union, has decided on the right itſelf of every Peer of Scotland. The act of Union has gone further, it has decided on the principle whereon the right is founded, and the deciſion of your Lordſhips ſets them both at defiance.

The ſpirit and principle of law in general, ought to be your Lordſhips' guide in your legiſlative capacity. And if Lord Stormont had moved the repeal of ſo much of the act of Union, as relates to the right of Peers of both countries to ſit and vote amongſt the Peers of Scotland, the reflections of Lord Loughborough on the general nature of repreſentation, would have been properly urged. If his doctrine was founded, perhaps ſuch an alteration of the law might appear judicious. But, even if the doctrine is juſt, it is doubtful whether the law had not better remain as it is. The right of a Scotch Peer is repreſented as being of little conſequence to any Lord poſſeſſed

of

of an hereditary ſeat in Parliament. If the matter is of ſuch ſmall moment, it is ſcarce worth while, on this account, to remove the corner ſtone of a fabrick built of ſuch heterogeneous materials—we cannot be certain of replacing it.

What do the ſpecious words of Lord Loughborough, on the neceſſary and abſolute parity of circumſtances in perſons to be repreſented, amount to? How ſhall we bring this queſtion on the principle of law to a fair iſſue?

Are the two rights of Britiſh and Scotch Peerages compatible or incompatible with one another?

The articles and act of Union are expreſs, that the two rights are compatible, and on this ground was the opinion of the twelve Judges given in the caſe of the Duke of Hamilton and Brandon, and the deciſion of the Houſe of Lords thereon, was ſuppoſed to put an end to all queſtion concerning it. But the two former deciſions went upon the ground of incompatibility.

The firſt vote of the Houſe of Lords, depriving the Duke of Dover of his Scottiſh rights, was directly the reverſe in effect of the ſecond vote, which reſtored him his Scottiſh, and deprived him of his Britiſh rights. But the principle on which both votes was founded was the ſame, the difference lay in the

conſequence deduced from that principle. On both occaſions, the Houſe of Lords was of opinion, that the two rights were incompatible, and conſequently could not be poſſeſſed by one and the ſame perſon. The firſt vote determined, that a perſon on whom the greater right was conferred, muſt relinguiſh the ſmaller one which he firſt ſtood poſſeſſed of. The ſecond, that being in poſſeſſion of a ſmaller right, which he could not get rid of, he was not in a capacity of receiving the greater.

I was amazed that Lord Loughborough choſe to argue, that as the reſolution againſt the Britiſh rights of the Dukes of Dover and Brandon was reſcinded, the prior reſolution againſt the Scottiſh right of the Duke of Queenſberry ſtood good; his Lordſhip certainly could not be aware to what extent this argument led.

I cannot but agree with the Earl of Morton, that the Peers of Scotland are but little obliged to their two noble countrymen for the pains they have taken; and was perfectly aſtoniſhed to hear ſome of my countrymen below the bar, give the epithet of *bold* to his conduct, intimating thereby, that his Lordſhip was arguing againſt the rights of the Peerage he repreſented, and might poſſibly never repreſent in another Parliament on account of his conduct on this occaſion. I can ſcarce think

a majority of the Scotch Peerage ſo blind to their own dignity and advantage, as to imagine the Earl of Morton was arguing againſt them, any more than they can think Lords Stormont and Loughborough were arguing for them. The perſevering fortitude of the young Duke of Hamilton, had given the Peerage of Scotland the very beſt ground it was poſſible to place them on, and to his Grace his brethren are more obliged than to any one perſon. The opinion taken by the Houſe of Lords on the Articles and Act of Union, and a deciſion in conſequence, was of very different weight and authority than a party vote or two, overturned with ſuch due formality. Lords Stormont and Loughborough have diſlodged the Peerage of Scotland from this ſtrong hold, and replaced them on the ground of a partial party vote. The next opportunity that offers, all the Peers of Scotland, created Peers of Britain or England ſince the Union, may again be turned out of the Houſe of Lords, upon the ſame ground and principle as the Duke of Queenſberry was expelled from it ſeventy years ago.

I have already ſhewn, that the law has decided that the two rights are not incompatible, and ſhall hereafter endeavour to ſhew, that the law, as it ſtands, is founded in reaſon and common ſenſe. I ſhall therefore, without fear of prejudicing my countrymen, ſhew the true conſequence that would follow

follow from the admiſſion of the principle of incompatibility maintained by Lords Stormont and Loughborough.

If the principle of repreſentation requires ſo exact a parity of circumſtances in each member of a body to be repreſented, that none of them muſt have the ſmalleſt advantage over the other; if the rights of a Britiſh Peer are incompatible and contradictory to the rights of a Scotch one, ſo that they cannot both be poſſeſſed by one and the ſame perſon, I preſume, neither Lord Loughborough, nor any other Lord, will deny, that no act of the Crown can change the nature of things, and render theſe contradictory rights compatible. The King cannot by any patent enable the ſame perſon to hold them both; and upon this ground (which, taking the principle of incompatibility for granted, is not to be overturned by any poſſible means) did the Houſe of Lords expel the Duke of Dover, and refuſe to admit the Duke of Brandon to an hereditary ſeat in Parliament.

This Reſolution was even then conſidered as a very great hardſhip on the two Dukes in particular, and on the Peerage of Scotland in general. But it was only a neceſſary and fair conſequence of the principle then maintained by Earl Cowper, and now by Lord Loughborough. The inconvenience or hardſhip impoſed on individuals, or a body of men,

men, is of little importance, when compared to the maintenance of the ſpirit of our laws, and general principle on which the right of repreſentation is founded. It is the price paid by the body or individuals compoſing it, for the protection granted them by the Conſtitution.

It is needleſs to enumerate thoſe accidents and circumſtances which have occaſioned that, in one and the ſame kingdom, there ſhould be two different rights of Peerage; the one (of itſelf) giving a ſeat in the Upper Houſe of Parliament; the other of a mixed nature, hereditary and repreſentative. It ſuffices for our purpoſe, to ſtate that theſe two rights of Peerage do exiſt in the kingdom of Great Britain, and that, upon the arguments of Lord Loughborough, the Houſe of Peers have decided the one right to be incompatible with the other.

Upon theſe premiſes, I will maintain, the King cannot, in the nature of things, beſtow a Britiſh Peerage on a perſon who ſtands actually poſſeſſed of a Scotch Peerage. Such perſon muſt relinquiſh the leſſer right, before he can be in the capacity of receiving the greater. And circumſtances prevent a Peer of Scotland from being able to get rid of his leſs fertile honours, without an expedient almoſt too ridiculous to mention.

If

If the law of Scotland reſpecting Peerages had remained as before the Union, this difficulty might eaſily have been ſolved, by a reſignation of Scottiſh honors, and inſtantaneous grant following thereon of Britiſh honours. But this part of the law of Scotland is abrogated.

A perſon once poſſeſſed of a Scottiſh Peerage has no other means of getting rid of it than by forfeiture. If his attainder is afterwards in part reverſed by Act of Parliament, the King may beſtow upon him Britiſh honours, and the partial reverſal of the attainder may render ſuch perſon capable of receiving new rights, incompatible with thoſe held by him previous to his forfeiture.

This doctrine of Earl Cowper's (which admitting the principle of incompatibility is clear and irrefragable) did not apply to the wives or ſons of Scotch Peers; and until the two rights of Peerage were lately declared by the Houſe of Lords compatible, according to the opinion deliberately given by the twelve Judges, the Crown, when inclined to grant an hereditary ſeat in Parliament to the family of a Scotch Peer, has created his wife a Peereſs, or his ſon a Peer of Great Britain.

The principle of incompatibility went further than people imagined. As for inſtance:

The

The Counteſs of Bute was ſome years ago created Baroneſs Wortley. If the Earl, her huſband, had died immediately after this creation, their eldeſt ſon would inſtantly have become a Peer of Scotland, conſequently have no longer been in a capacity to inherit the Britiſh Peerage of his mother, incompatible with the right previouſly inherited from his father; and, *vice verſa*, if his mother had died firſt, he muſt inſtantly have inherited her Britiſh Peerage, and have become incapable of ſucceeding to the incompatible right of his father. This will explain why Lord Mountſtuart choſe to be created Baron Cardiff, whilſt both his father and mother were yet alive. Again,

At the death of a noble Earl, whoſe abilities will be regretted for ages after he has ceaſed to live, Lady Stormont will become Counteſs Mansfield; Lord Stormont undoubtedly expects and wiſhes ſhe ſhould enjoy her honors, long after he himſelf is laid in the grave. When his Lordſhip maintained the principle of incompatibility, he probably did not attend to this conſequence; that immediately upon his own death, his ſon would be Viſcount Stormont in Scotland, and would thereby be rendered incapable of ſucceeding to the Britiſh Earldom of his mother. Unleſs the common courſe of nature is reverſed in this boy's favour, and his mother, as yet under thirty, die before his father, turned of ſixty, he cannot ſucceed to the Earldom of Mans-

field, according to the ſpirit or principle of law maintained by Lord Stormont. Again,

The Counteſs of Sutherland has lately given an heir to two of the moſt ancient families in either part of Britain. If her Ladyſhip ſhould die before the Marquis of Stafford, or Earl Gower, her heirs muſt remain Earls of Sutherland, without poſſibility of inheriting the Britiſh honors of his father's line. Theſe muſt lie dormant, until the county of Sutherland again deſcends to a female. Again,

Upon the failure of the direct male line of Derby, the barony of Strange fell to the heir of line the Duke of Athol. His Grace was admitted as ſuch to the Houſe of Lords without oppoſition. Had the queſtion been agitated upon this principle of incompatibility, it is clear that he muſt have been excluded; for the words of the Act of Union do not ſtrictly apply to the caſe of a Scotch Peer *ſucceeding* to Engliſh honors, any more than to the caſe of a Scotch Peer *created* a Peer of Britain. That Act runs—That ſuch noble perſons as were, AT THE TIME OF THE UNION, Peers of both countries, ſhall remain poſſeſſed of the rights and privileges of both Peerages. Either thoſe words decide on the compatibility of the two rights, or they decide nothing in favour of the Duke of Athol,

who

who certainly, at the time of the Union, was not a Peer of England.

The doctrine maintained by the Lord Chief Juſtice of the Common Pleas of England went yet further. The neceſſary and inherent parity of circumſtances in the members of a body to be repreſented, contended for by his Lordſhip, can never be of a changeable nature. It is no more in the power of Parliament than of the Crown to render thoſe rights compatible, which in their nature are incompatible. Even Sir William Blackſtone admits that *the omnipotence of Parliament is ſomewhat* too bold a figure of ſpeech; and, according to the doctrine of Lord Loughborough, the firſt Parliament after the Union, which enacted, That certain perſons ſhould keep poſſeſſion of two rights incompatible with one another, exceeded the degree of power given to the Sovereign of the State, either by God or man. If Parliament, led away by a falſe idea of omnipotence, has paſſed an act reverſing the law of nature, and rendering two incompatible rights compatible, ſuch act ought certainly to be repealed. But is it equally clear, whether the judgment of your Lordſhips, previous to ſuch repeal, ought to be guided by the law of nature, or the Act of Parliament reverſing it? For to this length did the argument of Lord Loughborough run. His Lordſhip may poſſibly inſiſt that I do him injuſtice; but he muſt permit

me to obſerve, that if his argument went not thus far, it went no length at all. It is true, that if his Lordſhip had been contending for a repeal of the law which he combated the principle of, I could not have fairly drawn the inference I have from the arguments he made uſe of; but as his Lordſhip argued, that the Houſe ſhould be determined in its deciſion on the compatibility or incompatibility of two rights, by the ſpirit or principle of repreſentation in general, in oppoſition to the letter of the law on this particular caſe, I do maintain, that the argument either went the whole length I ſtate, or that it was not applicable to the queſtion then before the Houſe.

Notwithſtanding that the law has already declared the rights of Britiſh and Scotch Peerages to be compatible with one another, and that it is clear the adoption of the contrary principle muſt render the Peers of Scotland incapable of Britiſh honors; I am ready to admit, that if an exact parity of circumſtances in members of a body to be repreſented is required by the principle of repreſentation in general, then the Articles and Act of Union ought to be amended, ſo as to make them coincide with the principles of repreſentation adopted in other caſes of like nature by the Conſtitution of England. Let us examine and compare them.

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The Peers of Scotland have the ſame rights, franchiſes, and privileges, as thoſe of England, though of ſeveral deſcriptions. Every Peer in the kingdom belongs to the ſame claſs of the community. None of them can ſit in the Lower Houſe of Parliament, or be upon Juries, ſave where thoſe of their own claſs are parties: they are the Pares of each other. In one particular right only there is a ſhade of difference between them. That ſhade is indeed of the moſt material conſequence; but ſtill it is only a ſhade. The right of ſitting Parliament by virtue of hereditary deſcent, is inherent in them all alike, but dormant in the Peer of Scotland, until called to life by the voice of the whole body. His hereditary right muſt be fortified by that of election, before he can take his ſeat in the Parliament of Britain. Whenever the number of Scotch Peers comes to be reduced to the ſtandard of proportion to thoſe of England, eſtabliſhed at the Union, then the Peers of Scotland, as well as thoſe of Britain or England, will have ſeats merely hereditary.

It may perhaps be urged by thoſe who argue for the incompatibility of the two rights, that Scotch Peers being elected for no more than ſeven years, render the ſhades of difference ſtronger than if they were elected for life. But this makes no difference in the queſtion we are conſi-

dering.

dering. The argument of compatibility and incompatibility will ſtand juſt the ſame for whatever term they are elected.

A Peer of Scotland, who has been choſen to repreſent his brother Peers in the Parliament of Britain, is certainly not rendered leſs worthy of the honor conferred upon him by them, by the grant of an hereditary ſeat from the Crown. It does not follow, that a perſon worthy of a temporary ſeat, muſt be worthy of a perpetual ſeat; but it does follow, that a perſon worthy of a perpetual ſeat, muſt be worthy of a temporary one. Indeed, if the Peers of Scotland were bound to vote in Parliament, as thoſe they repreſent direct, under pain of vacating their ſeat, then the argument would be good; but as that is not the caſe, it is difficult to conceive, why a Peer of Scotland, to whom an hereditary ſeat has been granted ſince his election, ſhould ceaſe to repreſent thoſe who elected him to a temporary ſeat. If it is ſuppoſed that the obtaining this additional right will make him vote or act differently in Parliament, than he would have done before; this is maintaining him to be a perſon unworthy of any ſeat, temporary or perpetual. The utmoſt extent of the article goes only to prove, that his ſeat ought to be vacated, but not at all to make him incapable of being re-elected, or of voting at any future election.

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I have heard a conſequence that follows from the doctrine I maintain, urged as an argument againſt it. " A Peer of Scotland might then be " elected one of the Sixteen, although a Peer of " Britain." In my opinion, there is much more reaſon to wiſh, that Peers of this deſcription ſhould be elected, than to fear that they will. 1ſt, They can have little or no motive to wiſh it themſelves? 2d, It can never be the intereſt of the Peerage of Scotland to elect them. 3d, The Miniſters of the Crown, unleſs very much altered in their diſpoſition, will rather have ſixteen dependent, than ſixteen independent Peers in Parliament; conſequently, the Peers of Scotland will not be tampered with to elect ſuch of themſelves as have hereditary ſeats.

If the incompatibility between perſonal and repreſentative right exiſts, as contended for, it muſt be found in other branches of the conſtitution. Can a member of the lower Houſe vote for another perſon to repreſent him in the ſame Houſe as he himſelf ſits? Yes.—Does this apply to the Upper Houſe? As far as the nature of the two branches of legiſlature agree, ſo far is this a caſe in point, the principle is the ſame. A man may himſelf ſit in that Houſe of Parliament to which he ſends a repreſentative. His abſolute poſſeſſion of a right (abſolute from the moment he is himſelf elected) does not prohibit him from exerciſing his previous right of repreſentation, and delegating another.

another. If the ſame perſon is choſen to repreſent two different places in the Lower Houſe, he cannot ſit for both, becauſe the law has decided the number of perſons that the Commons of Britain ſhall be repreſented by, but the member has the choice for which place he will ſerve. The law has not decided on the number of the Houſe of Peers; the *ratio quare* that prohibits the ſame perſon from ſerving in two different capacities in the Lower, is wanting alſo in the Upper Houſe. But if the ſame cauſe operated on both Houſes, the ſame conſequence muſt follow; a Peer poſſeſſed of perſonal and repreſentative right to a ſeat in the Houſe of Lords, muſt then have his option in which capacity he would ſerve.

The only parity of circumſtances required of perſons poſſeſſed of a right to be repreſented in Parliament, which I know of, is, that the perſon voting, or elected, ſhould be of the ſame claſs of the community. And there are but two claſſes acknowledged by the law of the land, *Peers* and *Commoners*. The rights of ſeveral ſpecies of Commoners, differ much more widely and eſſentially from one another, than thoſe of a Britiſh and of a Scotch Peer. There are ſome Commoners capable of being repreſented. and not capable of repreſenting; there are others capable of repreſenting, and not capable of being repreſented. A Commoner may be in poſſeſſion of a right that entitles him, and his heirs, to ſit in the Lower Houſe

Houſe of Parliament, as long as he, or they, ſhall hold that right. A Commoner of Britain, may be a Peer of Ireland. One Commoner may have a thouſand different rights and advantages over another Commoner. Mr. Pultney and his Shoe-black, have probably both of them votes in the city of Weſtminſter. Will any one pretend to ſay, that the parity of circumſtances between them is not merely ideal? That they are likely to have the ſame views, intereſt, or connection? There is but one ſpecies of right common to them both; and that is but one half of the right common to the Peer of Scotland *ſimpliciter*, and the perſon who is a Peer both of Britain and Scotland. If Mr. Pultney, poſſeſſed of ſo many rights and advantages more than the Shoe-black, can repreſent him in Parliament, why ſhould not a Peer of Britain, as well as of Scotland, repreſent the leſs fortunate of the community to which he belongs? If we once let go the deſcription of Pares drawn by the law, it may be long before we agree on another, there is no ſaying where the diſcuſſion will lead us. If we venture into the labyrinth without the clue, we may never find the way out again.

I apprehend I have proved, that there is no incompatibility in the nature of Britiſh and Scotch Peerages; that they are not contradictory rights according to the ſpirit or general principle of repreſentation eſtabliſhed by the law and conſtitu-

tion of England. I hope, however, not to be underſtood as maintaining hereditary and elective rights to be of a congenial nature, they are far otherwiſe; but any argument derived from this ſource, will more apply to the incongruity adopted at the Union, of mixing the two rights in the ſame Houſe of Parliament, than to the incompatibility of their nature. This falſe ſyſtem was admitted from the neceſſity of the moment, which is happily diminiſhing every day.

It is no eaſy matter to form a Union between two nations, the principles of whoſe conſtitution are different. It is ſaid, that the conſtitutions of England and Scotland were originally the ſame. Perhaps they were ſo; I ſhall not attempt to combat the poſition, however problematical it may appear to me. They certainly were very different at the time of the Union, and I am ſorry to ſay, yet remain ſo in the points moſt eſſential to liberty. The people of Scotland are no more repreſented, in either Houſe of the Britiſh Parliament, than the people of France. And there are no juries, in matters of civil juriſdiction, on the north ſide of Tweed. Thoſe who aſſert, that the conſtitutions of both countries were originally fœdal or ariſtocratical, muſt admit, that the ſpirit of democracy had greatly meliorated the conſtitution of England before the Union, and that, until that epoch, not a par-

a particle of this ſpirit was to be found from one end of Scotland to the other.

From the different ſpirit of the two ſpecies of government, aroſe the difficulties that thwarted the Union. Some abſurdities were admitted into the formation of both Houſes of the Parliament of Britain, rather than loſe the advantages of uniting the whole iſland into one body. My reflections, at preſent, are reſtricted to the formation of the Upper Houſe.

The parliamentary right of a Britiſh or Engliſh Peer, is merely hereditary. The right of a Scotch Peer, both hereditary and elective; they are conjunct rights, conſequently cannot be deemed incompatible, without overturning that article of the Union which regulates the degree of legiſlative and judicial power to be poſſeſſed by the Peers of Scotland, conſidered as a diviſion of the Peerage of Great Britain.

That this conjunction of rights was a fanciful device, againſt which many weighty objections lay, I believe, no body will, at this day, deny. It was a marriage of parties of very different age, complection, temper, manners, and character, moſt extremely ill-ſuited to one another; that they have diſagreed, and that their iſſue have not done good ſervice to the ſtate, is but too ſure. But the

marriage did take place, and ſixteen of the motley progeny have, from that time, had a ſeat amongſt the hereditary Peers of Parliament. Whether their conduct in that auguſt Aſſembly has, or has not, tended to the honor of the Houſe they were admitted into, or of that body which ſent them, is not to the preſent queſtion. There they are hereditary elective Peers of Parliament. I am, for my own part, free to confeſs, that the ſooner this Mulatto race, partaking of all the bad qualities of both parents, and few of the good qualities of either, is at an end, the better it will be for the conſtitution of Britain. The ſooner they are extinct, the leſs diſtinction remains of different rights and privileges belonging to the ſame claſs of men, Peers, or Commoners, in either part of the kingdom; the firmer will the Union be, the more will the whole iſland be cemented together, it will be a Union in effect, as well as in name. But until this happy day ſhall come, we muſt be careful of not examining thoſe parts of the Union which are moſt liable to exception, with the ſcrupulous exactneſs of a mathematical definer of the terms of geometry. We had better leave hereditary and elective rights as we find them ſettled by the Union, without examining too cloſely how far they are conſiſtent or inconſiſtent with one another. Be the conjunction ever ſo abſurd, the argument will only apply to admitting any perſon by election into the hereditary council of the nation. A

Scotch

Scotch Peer muſt be poſſeſſed of both rights, before he can ſet his foot in the Houſe of Lords for ever ſo ſhort a time; and the giving him a right to remain there for ever, rather diminiſhes than increaſes the effect of an abſurdity which temporary circumſtances obliged the conſtitution to chuſe as the leaſt of two neceſſary evils.

The Chancellor obſerved, in this debate, that peers poſſeſſed of the firſt titles and greateſt eſtates in the northern part of the iſland, were not very likely to grow more attached to the ſouth on account of a Britiſh Barony without land annexed to it.

This additional advantage given to perſons who from prejudice, connection, and intereſt, muſt neceſſarily remain of the ſame ſentiments as previous to their having an abſolute hereditary ſeat in Parliament, ſeems more to the diſadvantage of the peers of England than thoſe of Scotland, who are generally ſuppoſed to be more verſed in the characters of the human race than ſtated by their countrymen Lords Stormont and Loughborough. If either of theſe Lords ſhould again be admitted into the councils of his Majeſty, I believe they will have more reliance on the hopes and fears of Members of both Houſes of Parliament than upon their gratitude for favours received. The vote of an independent Member of Parliament is certainly

tainly more honourable to a miniſter; but that of a dependent Member of either Houſe is rather the ſurer of the two; I mean in general, for exceptions muſt be made to all maxims, and the uniform patriotic oppoſition of the repreſentatives of the Scottiſh peerage reflects ſo much honour on themſelves and thoſe who elect them, that too much care cannot be taken leaſt a particle of miniſterial influence ſhould take root, and fix a ſtigma upon this illuſtrious body, which at preſent their jealous and indignant ſpirit will not brook the thought of. The late Duke of Queenſberry, good man, never allowed any miniſter to inſinuate even a wiſh for the regulation of his conduct as a peer of Scotland; but Lord Douglas of Ameſbury will in either or both capacities, of a Scotch Duke or Britiſh Baron, do juſt as any miniſter of any day ſhall direct his Lordſhip.

I am ſenſible that many of my countrymen may take offence at the freedom with which I have expreſſed my ſentiments on this occaſion. Providing Lords Thurlough and Loughborough (for both of whom I feel reſpect and reverence) are not offended at the liberty I have taken in quoting and making obſervations on their ſeveral arguments on a queſtion of right, I am not over anxious about pleaſing others by this publication. Courtiers will find fault with my venturing to maintain an old-faſhioned doctrine, That all things are not poſſible

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to the Crown: That the King cannot grant the rights of Peerage to a perſon whom the law, by ſome means or another, has rendered incapable of that honourable truſt *. The different degree of conſequence which I have ſtated to proceed from the different appellations of My Lord, and My Lord Duke, may be ridiculed in the regions of faſhion. And ſome peers of Scotland may think the arguments I have uſed to prove the compatibility of their rights with thoſe of the peerage of Britain, are not ſo convincing as thoſe which Earl Cowper has enabled me to give of the conſequence neceſſarily following from the admiſſion of the contrary doctrine. The Earl of Selkirk and Viſcount Stormont may be ſorry to ſtand convicted of having voluntarily quitted the ſtrong ground which the Duke of Hamilton carried for the Peerage of Scotland; of having ventured to reconduct the army they took the command of to that weak poſt from whence Earl Cowper formerly drove their fathers. A poſt ſo untenable, that if ever it is attacked again, the Peerage of Scotland muſt neceſſarily be drove from it a ſecond time. It is not to theſe able commanders I addreſs myſelf, but to the body of the Scotch Peerage and Lord Lough-

* The Author is of opinion, that until the ſentence of the Court Martial held upon Lord G. Sackville was reverſed, by ſome ſuperior judicature, his Lordſhip was not capable of bearing the honor of Peerage.

borough,

borough, entreating them to retreat in time. The chief purpoſe of this publication is to convince them, that they have injudiciouſly, and for the attainment of little or no advantage, taken an advanced poſt, which being untenable againſt an enemy, ſhould be quitted before any attack is made upon it, and the army reocupy thoſe heights in the rear which too much ſpirit and fire has tempted them to venture from; otherwiſe they may be ſurpriſed in the night, and, in the confuſion of their rout, they may be drove beyond thoſe heights, which, if they now march quietly back to, no force will dare to attack them upon. I give this advice as a Briton, not more attached to one part of the iſland than the other, and anxious that no more battles ſhould be fought, or diſputes ſubſiſt in the ſame iſland, on account of the former diviſion of it into two ſeparate kingdoms. If the prejudices that were entertained by the inhabitants of each had not greatly and viſibly decreaſed within theſe laſt twenty years, I ſhould not have dared to ſpeak the whole truth. But the eyes of both nations are opened. All men are become ſenſible that there ought to be but one common intereſt in the ſame kingdom; that what is for the good of one part of it muſt tend to the advantage of the other. Let us hope that the time is at hand when the Union of England and Scotland may be PERFECTED without riſk or danger—When it may be made real as well as nominal—When the whole

kingdom

kingdom may have ONE AND THE SAME CONSTITUTION.

Every impartial man muſt admit, that the junction of hereditary and elective rights in the Upper Houſe of Parliament, is inconſiſtent with the ſpirit of that branch of the legiſlature. The admiſſion of the ſixteen elected Peers of Scotland degrades the nature of the aſſembly they are ſent to, and the venal choice made by the Peerage of Scotland, fixes ſuch a ſtigma of diſgrace on the body repreſented, as all the blood in their veins cannot waſh away. Theſe ſixteen are nominally the repreſentatives of their brethren, but in fact of the Crown. They are delegated by the mandate of the Miniſter, and to him they in return delegate the uſe of that vote in Parliament, which they are content to hold as a truſt for his benefit. Several, but feeble, efforts have been made by the Scotch Peerage to emerge from this ſhameful ſtate of ſervitude. But Lord Elphinſtone * is the firſt and only Peer of his country, who can ſay he is the real as well as the nominal repreſentative of his brethren in the Parliament of Britain.

It is not many years ago ſince twenty Scotch Peers got together after a general election, and

* Since this was ſent to the preſs, the Earl of Selkirk and Lord Kinnaird may be added to the number.

ſigned a written engagement, UPON THEIR HONOUR, never to vote for a Peer recommended to them by a Miniſter of the Crown. Before Parliament met, one of the ſixteen died, whoſe election had occaſioned this ſacred engagement to be entered into. Twelve of thoſe twenty Peers who ſigned, ſolicited that recommendation which they had pledged their HONOUR never to attend to.

My Lords of England, do you ſhudder at ſuch proſtitution of your equivalent of an oath? Change circumſtances and ſituation with the Peers of Scotland, and *de vobis fabula narrabitur*. Reflect, for a moment, that theſe are either the ſons, or grandſons, of thoſe men, who, from the preference they gave to the general good of the community at large over the intereſt of themſelves and the particular claſs to which they belonged, were content to reduce themſelves and their poſterity to this dreadful ſtate of dependence, or rather ſervitude. Every page in the hiſtory of all countries ſhews, that the neceſſary conſequence of man's being placed in ſuch a ſtate, is the vileſt degradation of character. Some ſparks of fire and generoſity break out amongſt the negro ſlaves tranſported from Africa to our Weſt India colonies, but not an inſtance is to be met with of reſiſtance or indignation in a Creole ſlave.

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The Peers of Scotland, when poſſeſſed of greater power and conſequence, of more ample and diſtinctive privileges than the Peers of England, were actuated by a greater degree of public ſpirit than the Roman Curtius. Not contented with plunging themſelves into the abyſs, they caſt their poſterity into it along with them. The very principle to which all other conſiderations would have given way, the pride of family, was ſacrificed at the ſhrine of the Union. Emulate, my Lords of England, the generous virtue of the preceding generation, and pity the misfortunes of the preſent Peerage of Scotland; but do not deſpiſe them on account of the neceſſary effect of the unexampled patriotiſm of their fathers. Lend your aſſiſting hands to enable them to climb from the depth their virtue lies buried in, and help to remove the ſtone from the mouth of the abyſs they are pluuged into.

At the time of the Union, many reaſons concurred to render diſpatch of more conſequence than deliberation. The Parliaments of both countries were obliged rather to conſider what was the beſt mode of Union then poſſible, than what was the beſt of all poſſible Unions. Like Solon, they might ſay, it was not the beſt law in itſelf, but the beſt which the people were at that time capable of receiving. The two nations having now been in-

corporated for near a century, the habits, manners, and cuſtoms of each, having daily approximated more and more to one another, their prejudices have receded in proportion, and it is become poſſible to amend, perhaps to perfect, the law.

The junction of hereditary and elective right to a ſeat in Parliament, was an expedient. Experience has proved this expedient a bad one. It is not to be denied, that the Crown's having the command of ſixteen votes in the Upper Houſe of Parliament, is contrary to the ſpirit of the Conſtitution. To this, and other inſtances of the ſame nature, may be attributed the fall of Britain, from that heighth of proſperity and glory which his Majeſty found the kingdom placed on at his acceſſion to the government of it. Future ages will obſerve, that the Councils of George the Third were led by a Peer of Scotland, who had imbibed the principles and ſpirit of the Conſtitution of his own country, which has not LIBERTY for its OBJECT.

Liberty is the direct and avowed OBJECT of the Conſtitution of England, and an ardent deſire for the attainment of that object, is the actuating PRINCIPLE of it. Liberty and property are the words of an Engliſhman's *crie de guerre*. But theſe are not the ſounds that catch the Scotchman's ear, or fire his blood. Liberty was never thought of in

in Scotland, till after the Union. The word was not even underſtood. How ſhould it, in a country where the people were conſidered as non-entities in the eye of the law? Poſſeſſed of no rights, of no privileges, of no franchiſes, the lives of the people were at the mercy of their Chief, and little more ceremony uſed in paſſing ſentence upon them than upon brute beaſts. Men were hanged for amuſement, becauſe the young Laird was to be entertained with an execution. Liberty could not be the object of a country where ſuch laws exiſted.

The Conſtitution of Scotland was abſolutely fœdal. A ſpecies of government which muſt neceſſarily occaſion tumult and confuſion as long as it exiſts, from the object of it being double; the dominion of the Crown, and ariſtocracy over the people. Till one of the ruling powers overcame the other, all was confuſion; when either got abſolutely the better of the other, the Conſtitution was at an end. Loyalty ought to be the principle of this ſingular government, becauſe the Crown is that link of the chain that keeps the whole together. But the contradictory parts of this ill-adviſed ſyſtem are ſtronger than the cement, and each body of the ſtate is conſtantly tending to a ſeparation from the reſt. It is therefore difficult to ſay, what is the principle that urges a fœdal ſtate to action; but that which actuated, more than any

any other, the individuals of Scotland to action, was, THE LOVE OF FAMILY, of that Family or Clan to which the individual belonged. My Clan and my Chief, is the *crie de guerre* of a Scotchman. To the intereſt or advantage of his Chief, all other conſiderations gave way. Obedience to him is the firſt of all duties. His orders ſuperſede not only the law of the Sovereign, but even ſome of the laws of God. Your true Highlander thinks it meritorious to rob and plunder for his Chief, or to aſſiſt him in the rape of a Beauty or of an Heireſs. Not a Clan but every individual of it would have joined heart and hand to ſeize the Counteſs of Sutherland for their young Laird. Murdering a foe of the Clans was, till lately, called, *putting him out of the way*. If done openly, the action was highly meritorious and honourable; if ſecretly, it was a crime that much might be ſaid in excuſe for *.

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* It would not be fair to ſtate the bad, without marking the good qualities of the people of Scotland. If their attachment to their Clan and Chief leads them into ſome errors; to ſpeak more accurately, if on ſome occaſions they miſtake right and wrong, they make no exceptions in their own favour; they are ready to ſacrifice their own lives, as well as other people's, to the good of their Clan. This principle of attachment is nearly the ſame as the Spartans of old were actuated by, and there is a very ſtriking reſemblance throughout, between the characters of a modern Highlander and an ancient Spartan.

The immenſe difference between ſuch principles, and thoſe of the people of England, muſt ſtrike every one. No ſteps were taken to meliorate the principles derived from the Conſtitution of Scotland, till after the rebellion, 1745, when the Act paſſed for aboliſhing hereditary juriſdiction. The effect of this Act has been conſiderable, and the extravagant avarice of ſeveral Chieftains, has ſince done yet more towards demoliſhing the attachment and affection of their vaſſals.

The abolition of hereditary juriſdictions has confounded the object of the Conſtitution of Scotland, and the folly of the Nobility, or Chieftains, has nearly effaced the principle of the Conſtitution. But it is not ſufficient to have deſtroyed a falſe object, and overturned a narrow principle, without others are ſubſtituted in their ſtead. Surely means might be found to give the ſame object and principle to Scotland as England has ſo long found the benefit of. Liberty is a plant that generally thrives beſt in a cold climate and barren ſoil. If corruption ſhould break its mounds, and overflow

Spartan. The ſame hoſpitality and bravery, the ſame contempt of danger, toil, and poverty, the ſame perſeverance and ſteadineſs, the ſame pride, the ſame ſincerity and conſtancy of friendſhip, which nothing can get the better of, but the love of Sparta, or of the Clan.

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the plains, think where ſhall freedom fly for refuge in her diſtreſs, but to thoſe mountains which luxury abhors, and corruption ſickens at the very ſight of.

The Union of England and Scotland muſt remain incomplete, until both countries have the ſame OBJECT and PRINCIPLE. When the inhabitants of each part of the iſland are equally actuated by the love of liberty, then may we hope that the Union of the whole iſland will be perpetual. Till then it muſt be nominal and precarious. The firſt ſtep towards attaining this glorious end, is to purge the Upper Houſe of Parliament of its heterogeneous parts—the elected Peers of Scotland, and the tranſlated Biſhops. If the latter were altogether conſigned to the ſpiritual charge of their dioceſes, no detriment perhaps would ariſe to the temporal concerns of the ſtate, from Parliament's being deprived of their voice and opinions; but it is not abſolutely neceſſary for the ſpirit of the Conſtitution to proceed to ſuch extremities. A much gentler remedy may be applied, to correct the humour that has hitherto been found to corrupt the ſweeteſt blood of man, as ſoon as adorned with a ſurplice and lawn ſleeves. A Biſhop can no more reſiſt their contagion, than Hercules could the Centaur's ſkin. The remedy I preſcribe

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is on ſuch authority as the Church will not controvert. *A Biſhop ſhall be the Huſband but of one Wife:* which word Wife, until the 15th century, every expounder of the Goſpel conſtrued as a figure for Church or Dioceſe. If Parliament would adopt this reading, and prevent the tranſlation of Biſhops from one Dioceſe to another, the ears of their Lordſhips would become open to conviction on matters of State. A Miniſter then would have little more influence over a Spiritual than a Temporal Lord of Parliament.

The remedy for the ſame diſeaſe in the Peers of Scotland, is ſomewhat more difficult to be found. It lies deeper and more inveterate. The phyſic muſt therefore be made ſtronger, but it may be made palatable. The cauſe of the diſeaſe is already found, and that is the firſt ſtep towards a cure. As long as the Peerage of Scotland is actuated by a different ſpirit from that of England, as long as their ſeats in Parliament are dependent on the will of a Miniſter, ſo long will the Sixteen be as ſcabbed ſheep in the flock. Render their ſeats in Parliament unprecarious, and they will naturally, and without effort, adopt the genius of the Peers they ſit amongſt. Better for the Conſtitution of Britain, that a hundred Peers of Scotland ſhould be hereditary and independent, than that only ſixteen ſhould be elective and dependent. It is not from their numbers, but from their dependence, that

both England and Scotland are injured. A nobility of hereditary and elective nature, muſt ever be in ſome degree dependent; but when Peers of this deſcription are likewiſe pinched by poverty, they muſt neceſſarily be ſervile in the extreme. Rank and pre-eminence, without the means of ſupporting them, place men on the wheel of Ixion, and the tortures of Tantalus are realized on the greateſt part of the Peerage of Scotland. They muſt both grow rich and be freed from the badge of election, before the whole body can be actuated by the ſame ſpirit as the Peerage of England. As long as the two claſſes of Peers are actuated by different principles, the fewer Peers of Scotland that ſit in the Parliament of Britain, the better for the Conſtitution. As ſoon as they are actuated by the ſame principles, the number of either claſs will be of little conſequence. Perhaps a remedy may be found in the extremity of the evil, in the poverty of the Peerage.

If the Union is defective, there is no reaſon why the body that has already ſuffered moſt from the erection of the fabric, ſhould bear the whole charge and expence of the neceſſary repairs or alterations. The fixing a certain quantum of landed property as a qualification to ſit in the Houſe of Lords would be fully as conſiſtent with the ſpirit of the Upper Houſe of Parliament as of the Lower. Say, that the free landed property of 2,500l. a-year was the qualification

fication of a Peer. Such a regulation might for a time deprive ten or twelve Peers of England of their ſeat in Parliament; but not twenty of the Peers of Scotland whom it would not exclude. The effect of eſtabliſhing a general rule of this kind, equally affecting the Peers of both countries, would be, to fill the places of ſix and twenty dependent Peers with twenty independent ones: an effect moſt devoutly to be wiſhed for by every well-wiſher of Britain, whether born on the South or North ſide of the Tweed. But ſhould the prejudices of England not be yet ſufficiently aſſuaged, to admit a general rule applicable to the Peers of both countries alike, there is another mode of getting rid of the Peerage of Scotland.

If Scotland might hope for the participation of all the benefits that England derives from a free Conſtitution, if the PEOPLE of the North can be put on the ſame footing as the PEOPLE of the South, by the admiſſion of Juries * in Courts of Civil

* Whilſt I was putting theſe reflections on paper, I was informed of a ſtriking proof of the neceſſity of this meaſure. The deciſions of the Court of Seſſion, on the principle of making freehold qualifications, have been uniform for upwards of twenty years, and their opinions on this principle have, when appealed from, been conſtantly confirmed by the Houſe of Lords. This principle is in favour of a gentleman lately returned for a county, againſt whoſe election the Court Candidate has petitioned. The Court of Seſſion has not ſcrupled,

Civil Juriſdiction, and by repreſentation in the Houſe of Commons, I ſhould then wiſh for the adoption of the general rule reſpecting the Peerage of both countries already mentioned; which is plain, ſimple, and conſiſtent with the general ſpirit of the Conſtitution, as well as with the particular ſpirit of the Houſe of Lords. But if the PEOPLE of Scotland muſt not hope for the immediate attainment of ſuch bleſſings and happineſs, I ſhall then wiſh for the adoption of the mode I am going to mention.

There are about ſixty Peers of Scotland. Of theſe near two-thirds are not in ſuch affluence as to be able to attend Parliament without ſupport from the Crown; of the remaining third, one half is

on this occaſion, to give a deciſion againſt the principle they had before uniformly maintained; and one of the Judges, meaning to acquire favour, had the ridiculous aſſurance to declare from the Bench, "That any Gentlemen who ſhould "henceforwards make freehold qualifications in the manner "before approved of by the Court, but now proſcribed, were "SCOUNDRELS." Gentlemen, undoubtedly, are likely to pay great attention to the opinions of a Judge ſhifting with the weather-cock, and expreſſed with ſo little regard to decency or good manners. I am told, that the Judge who made this elegant ſpeech, has himſelf been in the cuſtom of making freehold qualifications of the nature thus proſcribed, and of accepting them himſelf from Lord Hopetoun, and others; but this cannot be true: for if it was, the whole world muſt ſee and admit, that the Judge is A SCOUNDREL, according to his own declaration.

rich,

rich, the other in eaſy circumſtances. If thoſe Peers who of themſelves are unable to attend Parliament, can be perſuaded to give up their right of Peerage to thoſe who are in the capacity of ſerving, all difficulties would be ſolved; Parliament would then have about twenty independent Peers of the North, inſtead of ſixteen dependent Peers of Scotland, and every Peer of either country would ſit in the Houſe of Lords without election. All diſtinction and difference of Peerage would ceaſe, and thoſe who before belonged to this claſs of the community, without right of ſitting in Parliament, would voluntarily become Commoners. Voluntarily? Yes; by the purchaſe of the rich from the poorer Peers.

There can be no doubt that the number of ſellers would near double the number of buyers. Scotchmen are yet more attached to their lands than their titles. Every man may entail lands on his family for ever, if he chooſes; yet each newspaper is filled with advertiſements of lands to be ſold. The legiſlature would ſoon ſee more occaſion to check than to encourage the ſale and purchaſe of rights between Peers; and juſtice to the poſterity of the man who deprives his unconſenting family of the rights of Peerage, would require that the lands he gets in lieu of thoſe rights ſhould be entailed in the ſame manner as the Peerage which he relinquiſhes. I do not mean that forty

Peers

Peers of Scotland would all at once conſent to ſell; but that in twenty years forty of them would gradually have ſold one after another.

Let the Act of Amendation run, That every Peer of Scotland, who ſhould make purchaſe by land of the rights of two other Peers of Scotland, ſhould from thenceforwards have right to an hereditary ſeat in the Britiſh Houſe of Lords, and the Peers purchaſed from, have neither hereditary nor elective rights of Peerage, but become Commoners to all intents and purpoſes. At the election next enſuing, after a Peer of Scotland ſhall thus have purchaſed an hereditary ſeat in Parliament, the Peerage of Scotland to ſend one repreſentative the leſs to Parliament. In leſs than twenty years, I am confident, more than ſixteen would have been ready to purchaſe, more than thirty-two to ſell. To take in the whole Peerage of Scotland into an arrangement of this kind, it would be neceſſary that England ſhould make no objection to the Peers of Scotland in Parliament being twenty, inſtead of ſixteen.

There is yet another mode of rendering the Peerage of Scotland more congenial to that of England. Let them, once for all, elect twenty of themſelves to hereditary ſeats in Parliament, and as theſe become extinct, let the ſucceſſion go according to the dates of their reſpective Peerages; and

and till the ſucceſſion opens to the families at firſt excluded, let them be capable of election and repreſentation in the Houſe of Commons as the Peers of Ireland are.

It is ſcarce poſſible to adopt any mode with regard to the parliamentary rights of the Peerage of Scotland, leſs conſiſtent with the general ſpirit of the conſtitution, or of the particular ſpirit of the bodies they are ſent by, or than to the mode adopted by the Union which is congenial to none, and inconſiſtent with all. Better for England, that all the Peers of Scotland ſhould have hereditary ſeats, and better for Scotland that they ſhould all be Commoners, than be upon the footing they now are.

I have extended theſe reflections much farther than I firſt intended. If I was to go deeper into other articles of the Union, requiring amendation, particularly the forgotten rights of the PEOPLE of Scotland, I ſhould exceed all bounds; but I cannot help touching on the conſequences that may ariſe from the contradictions of Laws on the ſame ſubjects in two different parts of the ſame kingdom—particularly on ſubjects of ſuch importance as MARRIAGE, and the LEGITIMACY of BIRTH.

In Scotland, a child born before marriage, is rendered legitimate by the ſubſequent marriage of its

its parents. In England, a child in this predicament, is held illegitimate. I do not pretend to ſay which law is beſt, but, I think, they ought to be ſame in every part of the kingdom, or ſome day or another great confuſion will enſue. I know of three Peers of England, now living, who, if their fathers had likewiſe been poſſeſſed of Scottiſh honours, could not have inherited them, on account of their elder brothers held legitimate by the law of Scotland, and illegitimate by the law of England. It may be a queſtion, whether children in this predicament, born in Scotland, of Engliſh parents, are to be judged of by the law of one part of the country or of the other. There are now ſeveral noblemen who are Peers of both countries, and the children of ſome of them may, hereafter, have occaſion to rue the contradiction of the two laws, and the uncertainty ariſing from it. Lord Trentham, for inſtance, may have a child born to him before marriage, by the ſame woman as he afterwards may marry and have other children by. Is the ſucceſſion of Lady Sutherland to be regulated by the law of Scotland, or by the law of that country in which her grand-children may happen to be born? Lord Trentham may live, for a year and a day, in the caſtle of Sutherland, at bed and board with his houſe-maid, without either his, or any of his Engliſh relations, dreaming of his being married to that maid. He may afterwards marry ſuitable to his rank, and when the

children

children of that marriage are grown up, the child of the houſe-maid may ſtart up, and ouſt them of the county of Sutherland. Quere, What in this caſe is to become of the Engliſh Marquiſate of Stafford and Earldom of Gower? Are the children of Lord Trentham's marriage in England, to be rendered illegitimate, by their father's having lived, for a twelvemonth and a day, at bed and board with a honſe-maid? Is her child to ſucceed to the Engliſh, as well as to the Scotch honour?

As long as a difference, or an uncertainty, remains on the laws of marriage and legitimacy in two parts of the ſame country, a door, or rather a wide gap is open to confuſion on matters of the firſt conſequence to the peace and quiet of every family in both parts of the kingdom. As the law of Scotland ſtands in theſe reſpects, Engliſh women of faſhion, and their parents, cannot be too careful how they admit the addreſſes, not only of Scotchmen, but even of Engliſhmen who have happened to reſide in their youth beyond the Tweed, for a twelvemonth and a day. For if they have cohabited, for that time, with the ſame woman, they are married. A ſtripling may be utterly ignorant, even unſuſpicious, of his having taken a wife; but if, during a woman's life whom he has cohabited with for a twelvemonth and a day, after he is fourteen years of age, he goes through the ceremonies of marriage with any other woman, the law of Scotland will only conſider that woman

as his concubine, and the offspring of his marriage as illegitimate.

The eccleſiaſtical law of Scotland formerly took ſuch pains to prevent one man from having connection with more than one woman, that, to prevent the entire depopulation of the country, the civil law found itſelf under the neceſſity of exhorting the eccleſiaſtical law to render the conjunction of one man to one woman as eaſy as poſſible. The nuptial couch ſtands open and unguarded, inviting every couple to take immediate poſſeſſion of the rights of nature. The law rather forces the unwilling to make uſe of it, than ſtops, or checks, the impulſe of the fleſh, well knowing, that the coldeſt of both ſexes are at ſome moment inclined to temptation. Hence every advantage is given to each ſex over the other. Grown women are encouraged to enveigle boys of fourteen. Men to enſnare a child of twelve years of age. A rape is ſanctified, provided it is committed on the nuptial bed.

It is almoſt as eaſy to diſſolve a marriage in Scotland as to contract one. It is not more difficult to get out, than to get into the nooſe. The pains formerly inflicted on account of adultery by eccleſiaſtical law, are abrogated, or obſolete, yet the civil law ſtands as it did, whilſt the criminal juriſdiction of the clergy was in force. The adultery of either ſex, is equally cauſe for the entire diſſo-

diſſolution of marriage. The unoffending party may marry any one, and the offending party any one but the perſon with whom the crime was committed. The conſequence is evident; whenever man and wife are tired of one another, and wiſh to be diſunited, they are divorced with little or no trouble, and both of them may put into the lottery again, in hopes of the prize they were diſappointed of in the firſt. I muſt confeſs, that I never could conceive how two perſons, being tired of one another, came to be thought a reaſon for forcing them to remain in bonds which they find inſupportable. To me, their being both ſick of one another, ſeems a better reaſon for ſeparating them, than one only being tired of the other. I have heard the firſt authority in this country aſſert, that no divorce ought to be permitted where the colluſion of parties appears evident, but I cannot conceive wherefore, for colluſion ſeems the beſt of all proofs to me that the marriage ſhould be diſſolved, of itſelf it is cauſe ſufficient for a divorce, without having recourſe to paw words of infidelity and adultery. In this, however, as in every thing elſe, I ſubmit my poor opinion to the Chancellor's better judgement, I only contend, that the law, both as to contracting and diſſolving of marriages, ought to be the ſame in every part of the ſame country, otherwiſe it may be difficult for any man to be certain whether he is married or not. In order to illuſtrate the difficulties that may ariſe,

I ſhall beg leave to ſtate a caſe of divorce which actually happened a few years ago.

The late General Scot married Lady Mary Hay at London*; they cohabited as man and wife for about two years, part of that time in England, part in Scotland. The lady was then ſaid to be detected in the act of adultery, at Barnet, in England. The fact was proved at Edinburgh, according to the law of Scotland; the marriage was diſſolved by the law of Scotland. No ſteps were taken for the diſſolution of the marriage, according to the law of England. Lady Mary afterwards went through the forms of marriage with a French Nobleman, by whom ſhe has ſeveral children. General Scott alſo went through the forms of marriage with the daughter of the Preſident of the Court of Seſſion, by whom he left three children.

It would be curious if it ſhould turn out, that the nephew of Earl Mansfield, meaning to take the daughter of the Preſident of the Court of Seſſion to wife, ſhould have erred in ſuch a manner as to render the Lady his concubine†, and

* I am not certain whether the marriage was celebrated at London or Edinburgh. In fact, it makes no difference, or very little on the queſtion,

† It is ſcarce neceſſary to obſerve, that whatever deciſion may be given on this caſe by the law, the reputation of the Lady would no ways be affected by it. Few women, of any conntry, can deſerve a better character than this lady, who is happy in the eſteem of all her acquaintance.

his

his children illegitimate, in the eye of the law. Yet, upon examination, this may be found to be the caſe; and was any friend of mine to marry the eldeſt daughter of General Scott, I would adviſe him to apply for an act of Parliament, to put the legitimacy of his wife out of doubt.

Upon what principle is it to be determined which law is to decide on the validity of General Scott's divorce from Lady Mary Hay? Is it the place of birth of both, or of either parrty? Or the place where the act of marriage was conſummated? Or where the act of adultery was committed? Or is it the place where their property lay, that is to regulate by which law the divorce is to be judged of?

If perſons born in Scotland were eſteemed ſubject to the laws of marriage, or divorce, eſtabliſhed on the North-ſide of the Tweed, although they might afterwards reſide on the South-ſide of that river, the divorce in queſtion, would be clearly valid, both parties having been born in Scotland; but the contrary principle is admitted. The validity of a marriage is regulated, not by the law of the country where the parties were born, but by the law of that country where the marriage is contracted, otherwiſe, no marriage of Engliſh people could be valid, if contracted on the other ſide of Tweed. Where either of the parties are Engliſh, the marriage would not be good, unleſs celebrated according to the forms preſcribed by the law of England,

England. The validity of a marriage is decided on by the law of that country where the marriage is contracted. I therefore apprehend, that the validity of a divorce, muſt be decided on by the law of that country where the act of diſſolution of the contract of marriage is performed, where the adultery is committed. If a Frenchman gives me a bond in France, drawn up according to the forms French law, the bond is good in this country, as well as in that; if I bring it with me to England, I imagine it can only be cancelled by the laws of England.

In the caſe of adultery, the act muſt ſurely be proved according to the law of that country in which the act is committed. Though the penalty affixed to this crime is much ſeverer in Scotland than in England, the proof required is much leſs. The utmoſt extent of puniſhment for adultery in England, is ſeparation, *a menſe et toro*, mitigated by a maintenance to the unhappy woman; the proof muſt be clear and poſitive, ſo as to leave no ſhadow of doubt of the full accompliſhment of the act of marriage with ſome other man or woman than the huſband or wife, *nudus cum nuda, aut rem in re.* The court, competent to the caſe is high and reſpectable, in conſequence and character. In Scotland, the puniſhment of adultery extends to confiſcation of all property to the offended huſband, and abſolute diſſolution of the marriage. Incidents, ſurmiſes, reports, preſumptions ariſing

ſing from general levity of conduct, are admitted as proof. Sometimes the queſtion has been left open, whether a man ſeen in bed with a woman was the huſband, or ſome other perſon. The court veſted with, and exerciſing all this power, from whoſe deciſion no appeal lies, is compoſed of the refuſe of the Bar of the Court of Seſſion; the very firſt of which Bar, as well as of the Bench they plead to, are but too apt to pay greater deference to affection and favour than to juſtice or right. It is but too certain, that the Courts of England would not pay attention to ſuch proof as the Court of Scotland diſſolve many a marriage upon. Yet neither Houſe of Parliament will take the judgement of ſeparation *a menſe et toro* for proof of the act of adultery, when a bill for the diſſolution of marriage is before them. Had General Scott produced no more proof againſt Lady Mary before the Houſe of Lords, than he produced before the Commiſſary Court of Scotland, not a Peer of any deſcription would have conſidered the act of adultery as proven. Earl Mansfield himſelf would have been under the neceſſity of pointing out the deficiency; and this, probably, was the reaſon why this able man adviſed his nephew to ſue for a divorce in Scotland only.

How abſurd it ſeems, that the legiſlature of Britain ſhould be ſo very nice and preciſe on the law of marriages, contracted and diſſolved on this ſide of the Tweed, and ſo careleſs reſpecting them on the

the other ſide of that river, which all people may paſs whenever the fancy ſtrikes them, and by that means have their marriages contracted, or diſſolved, as ſuits their conſcience, or pleaſure, at the moment.

I have ventured to expreſs my ſentiments more fully than I ſhould otherwiſe have done on this contradiction of the law of Scotland, to that of England, in hopes that the ridiculous diſputes ſuch things may give riſe to, will make all men feel the neceſſity of altering the law of Scotland, with reſpect to marriages, in ſo far as to render ſome form neceſſary to confirm this moſt material of all contracts; and have only further to obſerve, that even this cannot be done, without as eſſential an ALTERATION of the UNION, as correcting the law of repreſentation, both with reſpect to Peers and Commoners. Let not the Peers of England imagine, that any of the alterations I have propoſed, reſpecting the Peerage of Scotland, are any ways contrary to the ſpirit of the law of that part of Britain. The Peerage of Scotland was much worſe handled, no later than in the reign of James the VIth, (the Iſt of England) when an act was paſſed that took the rights of Peerage from more than two hundred perſons at once.

FINIS